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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 315

ALEUTIAN LIVESTOCK COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Your petitioner, Aleutian Livestock Company, Inc., a corporation, petitions this Honorable Court for a writ of certiorari to review the judgment of the Court of Claims of the United States in the above entitled case.

Opinion Below

The opinion of the Court of Claims is not as yet reported, it appears in the record at pp. 32-35. The facts found by the Court of Claims appear in the record at pp. 18-32.

Jurisdiction

The judgment of the Court of Claims was entered on April 3, 1951 (R. 35) and a motion for a new trial was denied on June 5, 1951 (R. 35). The jurisdiction of this

Court is invoked under the provisions of Sections 1255, 2101, Title 28 U. S. Code. By order entered in this Court on August 21, 1951, the time for filing a petition for a writ of certiorari was extended to September 13, 1951 (R. 36).

Questions Presented

1. Whether evacuation and exclusion of petitioner from its property, and the taking of possession, occupation and use thereof by the armed forces of the United States was a taking of property compensable under the Fifth Amendment to the Federal Constitution.

2. Whether for the purpose of fixing the value of property taken for public use the court below had discretion to disregard uncontradicted expert opinions of value and if so whether such discretion was abused in this case.

3. Whether petitioner is estopped from asserting a claim against the United States for compensation for property taken for public use on a ground that petitioner had been reimbursed in part for its loss under a war damage insurance policy by the War Damage Corporation, a government owned corporation, in consideration of its assignment to the corporation, to the extent of any payment received thereon of recovery under any other claims for the loss.[1]

Statement of the Case

1. Petitioner seeks review of a judgment of the United States Court of Claims denying its claim for compensation under the Fifth Amendment to the Federal Constitution for the taking, using and occupying of its property on Umnak Island, Alaska over a period of approximately six months beginning July 5, 1942. The property involved was a lease-

[1] In the Court below the Government claimed estoppel, but the question was not reached there. Since decision of the point may be essential to final disposition of the case here, it is brought within the scope of the review sought by this petition.

hold, buildings, equipment and livestock used in a sheep ranching business from which petitioner was wholly excluded and with respect to which the Government's agents remained in exclusive possession, custody and control during the entire period. For lack of possession of its property petitioner was unable to provide proper husbandry for its herds. As a result thereof the Court below has found that petitioner lost 6369 head of sheep. The Court has also found that petitioner lost an additional 2000 sheep in excess of normal losses during the period required to reconstruct its operations from the state of severe disruption and deterioration permitted to arise while the property was under the exclusive control and custody of the Government (R. 28).

At all times here pertinent, petitioner had legal right to possession of Umnak Island under a lease from defendant (R. 18). On or about July 5, 1942 the armed forces of the defendant forceably evacuated from the island all of petitioners employees (R. 25) who were absent from the island thereafter until, pursuant to leave granted by defendant, they returned about December 15, 1942 (R. 26). During the period from July 5, to December 15, 1942 defendant's agents were in exclusive possession and control of that portion of the Island used by petitioner for its ranching business, and of all livestock and property of petitioner situated thereon (R. 29).

None of the property for which payment is here sought was destroyed in the course of combat activity. There were enemy (Japanese) forces in the general vicinity, occupying Kiska 560 miles away, and Attu and Agattu 740 miles away (R. 19, 25, 31). More than a month prior to defendant's occupation of petitioner's property, June 3 and 4, 1942, the enemy had made an aerial attack on Dutch Harbor 140 miles east of Umnak and about the same time enemy planes had encountered U. S. aerial opposition on a single occasion over

a portion of Umnak Island some 40 miles beyond Mt. Vsevidof, which constituted a practically impassable barrier between plaintiff's ranching operations and other portions of the island (R. 23).

The Court below based its decision on the ground that the loss sustained by petitioner was "an incident to the exercise of the sovereign power and duty to protect the people from attack by a hostile power", akin to injury resulting from collision of a fire engine going to a fire, curtailment of the use of property under quarantine regulations or laws regulating traffic in liquor or condemnation of an unsafe building (R. 34).

2. It would have cost at least $25.00 per head to replace line bred sheep such as those lost by petitioner at the time and place of the loss. (Cost in the United States at least $15.00 per head (Tr. 61, 116, 117) plus cost of transporting them to Umnak Island at $10.00 per head (R. 29)). Actual market value was reflected by the fact that over a number of years petitioner had voluntarily bought pure bred sheep at a price of more than $48.00 per head delivered at its ranch. (Cost in United States $30.56 plus transportation charge at $10.00 (R. 29) plus 25% los in shipment and acclimation (R. 20)). During a period devoted largely to careful breeding for stock improvement and for an increased number of sheep the business of petitioner yielded, in addition, net cash profit at the rate of nearly 6% on the investment, capitalized at $25.00 per head (R. 29). Petitioner's president, having long experience in the sheep ranching business and qualified as an expert, testified to an opinion that the sheep lost were worth at least $25.00 per head at the time and place of the loss (Tr. 61). There was no proof of any other value, yet the Court below found that the value of the sheep was $12.50 per head.

3. Prior to its loss here sued for petitioner obtained a policy of war damage insurance from the War Damage

Corporation. Petitioner asserted a claim under that policy and was paid $38,500 reimbursement for loss of livestock during the period of its exclusion from Umnak from July 5 to December 15, 1942. This was the full amount of the coverage provided by the policy for livestock loss. In consideration of this payment petitioner was required to assign to the War Damage Corporation to the extent of $38,500 "all the right, claims, interest, choses or things in action" which it "may have against the Government of Japan or any other party, person or corporation." Settlement under this policy was made while the war was still in progress when petitioner, and presumably the War Damage Corporation, lacked knowledge as to whether there had been actual combat on or near petitioner's place of business. Hence, the exact cause of the loss was then unknown.

In the Court below the petitioner frankly acknowledged assignment of its claim to the extent of the payment then received and so acknowledges it here and admits that in the event of recovery in this suit the amount recovered would be reduced to the extent of $38,500 in favor of any party entitled to the benefit of that assignment.

Reasons for Granting the Writ

The Court below has decided an important federal question probably in conflict with applicable decisions of this Court and has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I

The holding of the Court below that there was no taking of petitioner's property within the meaning of the Fifth Amendment to the Federal Constitution involves an important question of Federal law decided contrary to principles

established by this Court's decisions in *United States* v. *Russell*, 13 Wall. 623; *Irwin & Co.* v. *United States*, 127 U. S. 125; *Causby* v. *United States*, 328 U. S. 256; *United States* v. *General Motors Corp.*, 323 U. S. 373. The question involved is important because it is largely determinative of the application under conditions of modern warfare of the constitutional guarantee that just compensation shall be paid for private property taken for public use. Under the ruling of the Court below long established constitutional principles have been substantially chisled away on the ground in effect that they may not be applied under conditions of modern warfare. Yet it has been made clear that constitutional rights are not abridged or set aside in time of war but are to be invoked more vigorously to match increased wartime pressures for restricting them. In *Causby* v. *United States*, 104 Ct. Cl. 342, 356, affirmed by this Court 328 U. S. 256, it was pointed out, "The Constitution is not set aside in time of war. Indeed, the restraints of that instrument are especially necessary when our ordinary respect for the rights of others is often consumed in the hot fire of the passions aroused by war."

In the opinion of the military commanders who ordered the action, evacuation of petitioner from its property and possession thereof by the armed forces was a matter of military necessity. But military necessity has heretofore been regarded only as supporting the right of a military commander to deprive a private citizen of his property; it has not been regarded as the test of whether the deprivation constituted a taking to be compensated for under the Fifth Amendment.[2] The point was made clear in *United States*

[2] This power of a military commander to take property is of substantially the same nature as the power conferred upon executive officers to take proeprty by declaration of taking under the provisions of Chapter 307, Section 1, 46 Stat., 1421 (U. S. Code T-40, Section 258a). In one case there is a physical taking of possession of the property. In the

v. *Russell,* 13 Wall. 623, 629. Speaking in that case of a taking by reason of "imperative military necessity" this Court stated "such a taking of private property by the Government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger as heretofore described is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good but the government must make full restitution for the sacrifice." See also *Irwin & Company* v. *United States,* 23 Ct. Cl. 149, 127 U. S. 125 and 24 Ct. Cl. 187 in which a military commander in the field intercepted shipments of private property to prevent them from falling into the hands of the enemy. In accordance with the terms of the special act authorizing that suit recovery was allowed only for that property actually used by the military. The opinions made clear, however, that other property lost through deterioration and lack of care would normally be compensated for as private property taken for public use. Preventing the property from falling into the hands of the enemy, and to that extent weakening the enemy, was regarded as a public use.

Denial of compensation for loss due to destruction incident to combat activities has heretofore been restricted to

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other there is a symbolic taking by declaration. In both cases title to the property taken passes immediately, leaving the amount of purchase price and payment thereof for later determination and adjustment. The right to payment should be the same for an isolated taking in the remote Territory of Alaska as for the multitudinous takings closer to the seat of government in the various states.

those cases involving actual combat activities, such as the destruction of bridges to prevent their immediate use by advancing enemy troops (*United States* v. *Pacific Railroad,* 120 U. S. 227); the destruction of a dwelling house in use as a cover for enemy troops during actual battle (Veto message of President Grant, Congressional Globe, Vol. 104, Part 5 pp. 4155-56).

It is true that in times past non-compensable property losses of this character resulted from close range action and that with modern instruments of war such losses may be inflicted from great distances; but this proves only that the character of the action affecting private property rights is decisive, not geographical proximity to a combat area. In the present case injury to petitioner resulted because the government moved on to petitioner's property, took possession thereof, and required petitioner to vacate.

The fallacy in the reasoning of the Court below lies in its assumption of facts in the opinion not appearing in its findings of fact. For example the Court cites, in support of its ruling, *United States* v. *Pacific Railroad Company,* 120 U. S. 227, 233-239. The claim there was for destruction of bridges to prevent their immediate use by advancing enemy troops. There was no such destruction here, and there were no advancing troops to be delayed in their advance by any action found to have been taken by the government. In the same vein the Court likens the loss here to that resulting from collision of a fire engine going to a fire. But here there was no fire (i.e. no enemy force to be subdued), and no fire engine (i.e. our own combat force to resist the enemy advance), and no collision (i.e. actual combat). Neither is there anything to indicate a situation akin to a quarantine regulation for the public good.

II

The finding of the Court below that the value of petitioner's sheep at the time and place of taking was $12.50 per head constitutes departure from the accepted and usual course of judicial procedure, requiring exercise of this Court's power of supervision. That finding is arbitrary, not consistent with any evidence in the case, and directly opposed to uncontradicted evidence that the value of the sheep was at least $25.00 per head.

Replacement cost was at least $25.00 per head; earning capacity warranted capitalization at that price; petitioner's president, regarding the shown profit yield as satisfactory, testified to an opinion that the value of the sheep was at least $25.00 per head. With nearly 20 years of experience in the sheep raising business in the Aleutian area, he was plainly qualified as an expert whose opinion unopposed by other evidence cannot properly be denied probative value.

Conclusion

It is respectfully submitted that the writ of certiorari should issue and that the judgment of the Court below should be reviewed by this Court.

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